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CONTRIBUTORS OF LEADING ARTICLES IN THIS ISSUE

GEORGE E. WOODBINE is a Professor in the Yale Law School.

JOHN R. COMMONS has been Professor of Economics in the University of Wisconsin since 1904. He was president of the American Economists' Association in 1917. His published works include *Labor Legislation* (1916, with John B. Andrews); *Industrial Goodwill* (1919) and *Legal Foundations of Capitalism* (1924).

W. E. SUMMERS practiced law in Illinois from 1912 to 1915. He was formerly Professor of Law in the University of Kentucky, and has held a similar position in the University of Illinois since 1920.

## ALIENABILITY OF INTERESTS IN LAND HELD ADVERSELY

Under the early common law one whose land was in the adverse possession of another could not transfer his interest in it to a third person.[1] He was regarded as having "a right of entry and a right of action." These were treated as purely "personal rights" and so, like other "choses in action," non-assignable.[2] The common law rule was done away with by statute in England in 1845.[3] Similar statutes exist

[1] Ames, *Lectures on Legal History* (1913) 174.

[2] Ames. *op. cit. supra* note 1, at pp. 174, 210.

[3] (1845) 8 & 9 Vict. c. 106, sec. 6. See *Jenkin v. Jones* (1882, C. A.) L. R. 9 Q. B. Div. 128.

in many American states,[4] and in a number the courts refused, in the absence of a statute, to follow the English rule.[5] In perhaps a dozen states, however, the common law view was adopted.[6] We must hasten to add that these states in adopting the common law rule accepted with it a device which to a large extent destroyed the rule except as one of procedure. Treating the disseisee's interest as a "chose in action," the courts applied to it the familiar doctrine that an assignment of the "chose" carried with it a "power of attorney" to bring appropriate common law actions in the name of the assignor. This meant, in the case of the disseisee, bringing an action of ejectment in the name of the (disseisee) grantor.[7] The present writer has elsewhere shown[8] that in the case of an ordinary common law chose in action, such as a debt, the result was that in the developed system of the common law in this country[9] the assignee became the legal as well as the equitable "owner" of the "chose," except that before the debtor had notice of the assignment the assignor retained a power to destroy the assignee's rights.[10] In this earlier discussion it was pointed out that much the same thing

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[4] Ames, *loc. cit. supra* note 1 gives a list of these.

[5] Ames, *ibid.*

[6] Ames, *ibid.*

[7] This led to the interesting result of an action with the double fiction of two "nominal plaintiffs" and one "real plaintiff." *Jackson v. Leggett* (1831, N. Y. Sup. Ct.) 7 Wend. 377.

[8] Cook, *The Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816.

[9] This development was in general reached in the closing years of the eighteenth and early years of the nineteenth century. These statements refer to the American law, not the English.

[10] "Rights" is here used in the generic sense, including rights *stricto sensu* (claims with correlative duties), privileges, powers and immunities. Attention may perhaps be called to an unconscious misinterpretation of my position made by Professor Williston in the course of our discussion in the HARVARD LAW REVIEW. In *The Word "Equitable" and its Application to the Assignment of Choses in Action* (1918) 31 HARV. L. REV. 822, at p. 827, he says: "What I criticized, and still criticize, is that after having explained that the assignee, prior to notice to the debtor, has not all the rights, privileges, powers, and immunities of full ownership, he thereafter habitually calls the assignee owner and possessed of the legal title, and gives the weight of his approval to the equally ambiguous statements of others." As a matter of fact, that is just what I refused to do. In my original discussion I said: "A word must be said concerning the situation after assignment but before notice of it to the debtor. Clearly here the assignor retains some of the powers of an owner—he can extinguish the claim by release, accepting payment, etc. Such acts on his part, of course, are wrongs against the assignee and render him liable to actions for damages. Translating this into the terms of our analysis, we may say that the assignor retains some of his legal powers but has lost his privileges as owner of the *chose,* and *the assignee is as yet only partly owner because he lacks the immunities which are essential to complete ownership.*" The words in italics were not so printed in the original article. See Clark and Hutchins, *The Real Party in Interest* (1925) 34 YALE LAW JOURNAL, 259, 260.

could be said of the effects of this device upon the transferability of interests in land held adversely.[11]

New York is one of the states which adopted the common law view that the disseisee's interest is non-transferable, and with it also the device of the power of attorney.[12] In the recent case of *People v. Ladew*[13] the Court of Appeals has been compelled to consider exactly what, in its opinion, the relative interests of disseisor, disseisee, and grantee of disseisee really are. A survey of the prior New York cases reveals that in some respects the development in that state differs from that in some other states adopting the common law view. A brief review of the New York cases in comparison with those in other states is therefore necessary in order to appreciate the problem presented to the New York court.

In the case of the ordinary chose in action, the so-called "power of attorney" to sue in the assignor's name was ultimately held to be irrevocable, at law as well as in equity.[14] In some states the same result was reached in the case of the "power" of the grantee of a disseisee to use his grantor's name in a common law action.[15] The opposite result seems to have been reached in New York in early cases which held that the grantee could use the grantor's name only if the latter actually assented at the time of the bringing of the action.[16] The basis of this view was the assumption that after the deed something called "the title" to the land still remained in the grantor (disseisee); from which assumption was deduced the conclusion that the grantor, in spite of his deed, could recover possession of the land by bringing ejectment against the disseisor or other person and also forbid the grantee to do so, i.e., that he could revoke the grantee's "power of attorney."[17] It was, however,

[11] Cook, *op. cit. supra* note 8, at p. 835.

[12] *Webster v. Van Steenbergh* (1864, N. Y. Sup. Ct.) 46 Barb. 211; *Pearce v. Moore* (1889) 114 N. Y. 256.

[13] (1924) 237 N. Y. 413, 143 N. E. 238.

[14] This was of course not true in the early law, but had become so in the first quarter of the nineteenth century. The cases are given in my discussion referred to above, note 8. The additional "right" (legal relation) thus conferred upon the assignee is an immunity, i.e., freedom from power on the part of the assignor to destroy the assignee's rights.

[15] See *Steeple v. Downing* (1878) 60 Ind. 478, where the grantor gave the defendant (disseisor) a power of attorney to dismiss the suit brought by the grantee but labeled with the grantor's name. It was held that the grantor could not thus control the action.

[16] *Lowber v. Kelly* (1862, N. Y. Super. Ct.) 9 Bosw. 494. The actual decision in this case was that the grantee could not bring an equitable action in his own name against the grantor (disseisee) and adverse possessor. The reasoning of the court was based upon the rule as stated in the text, and apparently this was regarded as settled law. The Court of Appeals appears never to have passed upon the matter, but in *People v. Ladew, supra* note 13, the opinion of the majority assumes the law to be as stated.

[17] See the discussion of who may sue, etc., in *Livingston v. Proseus* (1842, N. Y. Sup. Ct.) 2 Hill, 526.

recognized that if the grantor did sue and recover a judgment for the possession, his recovery would inure, not for his own benefit, but for that of the grantee—an admission that ought to have led to an inquiry as to just what was meant by saying that the grantor still had "title."

When the Code of Civil Procedure was adopted, requiring all actions to be brought in the name of the real party in interest, the question was raised as to whether the grantee was the "real party in interest" and so could sue in his own name. To allow this would, of course, on its face recognize the transferability of interests in land held under adverse claim, in the teeth of the statute saying that such a grant was "void,"[18] as well as of the statute making it a criminal offense to execute the deed of transfer.[19] As this could not be admitted, it was argued that no one could sue, for, "if brought in the name of the grantee, he could, as against the party in possession, show no title; for, as against such party his deed was void. If brought in the name of the grantor, it might be shown that he was not the real party in interest, because, if he recover, his recovery would inure, not for his own benefit, but for the benefit of the grantee."[20]

This discussion led to the passage in 1882 of an amendment[21] to the "real party in interest" section, then Section 111 of the Code, by adding the words: "But an action may be maintained by a grantee of land in the name of the grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision."

Either as a result of this provision, or because of a change of view on the part of the court, it seems to have been clearly recognized in the subsequent cases in New York that the grantee no longer required the permission of the grantor to use the grantor's name.[22] But, still operating with the concept that "title" remained in the grantor, the New York court held that the grantee had no "property right" which he could pass on to a second grantee, and that therefore the latter could not sue, even in the name of the original grantor.[23]

Following out this same concept of the "title" as remaining in the

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[18] See *Chamberlain v. Taylor* (1883) 92 N. Y. 348.

[19] See *Chamberlain v. Taylor, supra* note 18.

[20] Woodruff, J., in *Hamilton v. Wright* (1868) 37 N. Y. 502, 507, quoted in Bliss, *Code Pleading* (3d ed. 1894) sec. 23a.

[21] N. Y. Laws, 1862, ch. 460, sec. 34.

[22] *Hamilton v. Wright, supra* note 20; *Smith v. Long* (1882, N. Y.) 12 Abb. N. C. 113.

[23] See *Smith v. Long, supra* note 22. It was also held that the grantor was responsible for costs, *Hamilton v. Wright, supra* note 20, on the ground that the suit was really his. This same problem had greatly troubled the courts in connection with the assignment of ordinary choses in action. The general trend was towards recognizing the truth of the situation and placing the sole responsibility for costs on the real plaintiff, the grantee, who alone could control the

grantor, and that no "property right" passed to the grantee, the Court of Appeals, reversing the Appellate Division, finally reached the extraordinary result, in the case of *Dever v. Haggerty*,[24] that if the grantor later conveyed to the adverse possessor, although the latter knew of the prior deed to the grantee, the deed passed the "title" to the adverse possessor! The argument is, if one admits the premises, simple. In the words of Werner, J.:

*"The title remained in the grantor,* while the grantee took nothing more than a right of entry which was merely a chose in action. . . . . This action [by the first grantee, but in the grantor's name] was not brought until after the delivery and recording of the deed from the plaintiff [i.e., the nominal plaintiff] to the defendant [the adverse possessor]. What was the effect of this deed? *The answer is obvious.* As the deed [to the real plaintiff] from the [nominal] plaintiff was *void, the title* to the premises remained in the former [i.e., the nominal plaintiff, grantor of the real plaintiff]. *The title* was, therefore, in the [nominal] plaintiff when she subsequently executed and delivered the deed to Haggerty [the adverse possessor, present defendant]. *That deed conveyed the* [nominal] *plaintiff's title to the defendant Haggerty."*[25]

Let us examine "the title" which the grantor is alleged to have had after the first deed, and see whether before the second deed the grantor really had all the rights which, it is now asserted, were merely transferred to the adverse possessor. Note that as between the grantee and the defendant, the grantee could recover possession by bringing an action, labelled, to be sure, with the grantor's name, but one which the grantor could not forbid, and in which the judgment nominally in favor of the grantor would inure to the grantee's benefit.[26] Note also that he alone would be responsible for the costs if judgment went in favor of the defendant. The possession thus acquired, the grantee could of course retain as against the grantor, as well as against third persons and the disseisor.

It is obvious that any plausibility which the view taken in *Dever v. Haggerty* may have is due to treating "the title" as some indivisible unity which is always "somewhere," instead of considering it as a very

action. Some of the cases are collected in Cook, *op. cit. supra* note 8, at p. 833, note 44. A subsequent amendment to the New York Code, N. Y. Laws, 1882, ch. 399, sec. 1, exempted the nominal plaintiff, the grantor, from costs and placed them upon the real plaintiff, the grantee. The substance of these amendments was carried over into sec. 1501 of the later forms of the Code of Civil Procedure, and is now found in sec. 994 of the Civil Practice Act.

[24] (1902) 169 N. Y. 481, 62 N. E. 586.

[25] Italics are the present writer's.

[26] Undoubtedly if the sheriff were to put the grantor into possession, his conduct would be tortious. His duty is to put the grantee into possession. This is what is meant by saying that the "recovery by the grantor inures to the benefit of the grantee." Note also that withholding possession by the disseisor from the grantee entitled the latter to damages. *Carey v. Lange* (1912, 2d Dept.) 153 App. Div. 372, 138 N. Y. Supp. 555.

complex aggregate of legal relations (rights (claims), privileges, powers and immunities) which is not necessarily and in its totality always vested in some one person. If the latter view is taken, it is at once apparent that the grantor never had, after the disseisin, that totality of legal relations commonly known as "title." Indeed, was it not the common law view that all he had was a "chose in action," and not "the title"?[27] The interesting thing about the opinion in *Dever v. Haggerty* is that, as the quotation above shows, the court expressly admits that a "right of entry," a "chose in action," passed to the grantee. One may well ask, then, what was this mysterious "title" which the grantor still had? Was it the right to recover possession from the defendant? Note that if the grantor brought the suit of his own motion, it was universally admitted that any judgment he obtained would inure to the grantee's benefit, not to that of the grantor. May we not, therefore, conclude that form is confused with substance in the opinion of Andrews, J., in *People v. Ladew,* when he says:

"The grantee, therefore, might never bring an action in ejectment in his own name. He had obtained nothing—no title, no right of entry, no chose in action of any kind. He had the bare right if his grantor ever legally ousted him in adverse possession to claim by estoppel the benefit of that result."

To say that one who has effective legal remedies, which cannot be denied him, to obtain possession from the adverse possessor and to retain it as against his grantor, and all other persons, has "obtained nothing—no title, no right of entry, no chose in action of any kind" is surely to close one's eyes to realities and to misstate the law. The result in *Dever v. Haggerty* plainly was, therefore, to confer upon the grantor a legal power to give to the disseisor rights which he, the grantor, did not himself have. It thus enabled him to destroy rights which, according to the prior decisions and the statutory provisions, were vested in the grantee and otherwise irrevocable by the grantor. Such a result is certainly out of line with the prior development of the law in connection with ordinary choses in action, where the assignor could not, after notice to the debtor, defeat the assignee's rights,[28] as well as difficult to justify on any grounds of policy if we once admit the soundness of the prior cases and the code provisions which protect the grantee against revocation.

We are now ready to examine the situation presented to the court in *People v. Ladew.* The state claimed title to land under a person whose "title" was derived from a grantor whose deed was executed and delivered while the land was in adverse possession, the deed to the state

[27] Compare the well-known rule that one disseised could not sue the disseisor or third persons for acts done on the land subsequent to the disseisin without first regaining possession. To be sure, on a realistic view these acts must have been tortious (as against the disseisee) when done, or no recovery for them could have been allowed after possession had been regained.

[28] Cook, *op. cit. supra* note 8, at p. 830.

having also been made while the adverse possession continued. Admittedly, one whose land was held adversely could make a valid grant to the state,[29] so that had the original grantor deeded directly to the state the latter would have acquired a valid claim. The question is thus raised: Shall the rule laid down in the early cases, that the grantee of land held adversely cannot give any rights to a second grantee who is a private person, be extended to cover a grant to the state?[30] The majority of the court, speaking through Andrews, J., answered the question in the affirmative. The argument, as shown by the quotation above, is, that the grantee got "nothing" by the grant and so could convey "'nothing" to the state. It is not without interest to note that the "right of entry," the "chose in action," which the court in *Dever v. Haggerty* admitted was transferred to the grantee, has now dwindled to "nothing."

In an illuminating opinion Cardozo, J., dissented. He demonstrates very clearly that on the basis of the past decisions in New York the grantee received by the grant a very substantial aggregate of rights, and points out that the impression that this is not so is due to the technicalities of an antiquated procedure. His refusal to apply to the state the rule denying that the grantee can make a valid grant of his rights to a private person is based upon the following argument: The policy which originally led to the prohibition of the transfer of land held adversely, whatever it may have been,[31] never applied to grants to the state directly from the disseised person. For similar reasons, the rule forbidding the grantee to transfer his rights, whatever they are, to a second grantee, ought not to be extended to a case where the second grantee is the state. The argument seems conclusive.

It would be difficult to find in the reported cases a clearer illustration of the importance of equipping lawyers and judges with adequate analytical tools with which to work. For want of such an equipment, the majority of the Court of Appeals seem to the present writer to have reached a decision in an important case by means of an argument which cannot stand the test of careful analysis, and one for which, in the light of the policy established by past decisions, it is difficult to see any justification.

W. W. C.

SERVICE OF PROCESS ON NONRESIDENTS IN ACTIONS IN PERSONAM

The power of an American state through its courts to affect the legal relations within that state of a nonresident becomes of concern under the Fourteenth Amendment when sought to be manifested through

[29] Just as he could assign an ordinary chose in action to the state.

[30] The word "extended" is here used intentionally, for confessedly it had never previously been decided that the grantee of a disseisee could not transfer his rights to the state.

[31] Bordwell, *Seisin and Disseisin* (1921) 34 HARV. L. REV. 717, 734-36, discusses the pros and cons of the rule.

state legislation.[1] In the absence of constitutional or statutory law, Anglo-American courts at least have adopted rules as to the exercise of jurisdiction[2] to meet the exigencies of the moment; they have exercised or declined to exercise the power to declare or change legal relations in accordance with notions of policy. International law does not, it seems, limit in any appreciable way a state in the international sense as to what it can and may do within its own borders so far as the acquisition or exercise of jurisdiction by its courts is concerned.[3] Whether the totality of judicial action by a state will have legal consequences attached to it in other states raises a second and different question.[4] It does not always follow that where the second state has refused to "recognize," or attribute legal effect to, the judicial action of the first state, that the latter was without "jurisdiction" and that the "judgment" is "void."[5]

[1] See *infra* note 10. The question which generally arises is whether the statute purporting to clothe the court with jurisdiction or to provide for service of process over nonresidents is constitutional. A federal statute containing similar provisions with respect to the federal courts might conceivably raise a similar problem under the Fifth Amendment.

[2] Jurisdiction is the power to render a judgment or decree establishing or changing the legal relations of the litigants. "A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant." Holmes, J., in *Chic. Life Ins. Co. v. Cherry* (1917) 244 U. S. 25, 29, 37 Sup. Ct. 492, 493. See Cook, *The Powers of Courts of Equity* (1915) 15 COL. L. REV. 37, 106 *et seq.; cf.* COMMENTS (1919) 28 YALE LAW JOURNAL, 579. Unfortunately, many courts and writers use the term "jurisdiction" interchangeably in the sense of legal power and state, or territory. In *De la Montanya v. De la Montanya* (1896) 112 Calif. 131, 133, 44 Pac. 354, the court said it did "not doubt that the mere presence of infants within a jurisdiction is sufficient to confer jurisdiction, although they may be residents of another state. But as such jurisdiction is always exercised for the good of the child, the courts would never allow the power to be used for purposes of oppression, or to prevent an infant temporarily within its jurisdiction from being taken away, when its best interests required it, to its more permanent residence. The jurisdiction is never used except when necessary for the good of the child."

[3] It is possible to assume a case under a system of international law where a state would have the power to affect the legal relations within that state of a nonresident and at the same time lack the privilege to do so. Where an international state is not fettered by a rule of international law—apparently the situation to-day—it seems inaccurate to speak of "jurisdiction of a sovereign state." A "sovereign" state in the "absolute" sense is not spoken of as having the legal power to adjudicate, since its conduct is not dependent upon nor controlled by any higher agency.

In the present discussion, unless otherwise indicated, the term "jurisdiction of the court" and others substantially similar are used in the broad sense of "jurisdiction of the American state" and not in the narrow sense of the power which the legislature of that state has conferred upon a particular court.

[4] The policy which has induced courts not to attach legal consequences to foreign judicial action seems to have been carried over into the realm of American constitutional law. It is that policy which dictates that a "judgment" rendered not in accordance with constitutional provisions (see *infra* notes 10, 11) shall not be given any legal effect even in the state of the forum.

[5] So long as the courts of the forum give effect to the judicial action thus taken, one cannot agree with Professor Beale that the judgment is no judgment at all.

Many cases which speak of lack of jurisdiction simply show on close analysis that the courts have been discretionary in the exercise of an already existing jurisdiction; that it has not been exercised in many instances because of some prevailing policy. The application of the above analysis in considering the question of service of process on nonresidents it is believed can be very useful.

Since actual service of process is in most personal actions a necessary fact without which the court will refuse to exercise jurisdiction with respect to the controversy, it follows that lack of effective service will necessarily result in the court's refusal to touch the legal relations within the state of a nonresident. The older notion seems to have been that potential physical control of the person whose legal relations were to be affected was the basis of the exercise of jurisdiction.[6] The requirement of service of process as a formal and technical institution is in many of its phases a lingering survival of the notion.[7] That notion

See Beale, *The Jurisdiction of a Sovereign State* (1923) 36 HARV. L. REV. 241, 243, 244. The conclusion would follow if the action of the court were contrary to international law or the municipal law of the forum. In the absence of such legal inhibitions, the state of the forum, acting through its courts, will give effect to the action of its own courts. In proper cases, the defendant, if present within the state, will be liable to arrest and imprisonment, or his chattels can be seized and sold. It is not believed that such action would constitute a *casus belli*.

[6] As already stated, a court has oftentimes spoken in terms of lack of jurisdiction, although, in the absence of restraints of international or of municipal law, the case has been simply one of refusal to exercise an already existing jurisdiction. See the following expressions of Holmes, J.: "Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure." *Mich. Trust Co. v. Ferry* (1913) 228 U. S. 346, 353, 33 Sup. Ct. 550, 552. "The foundation of jurisdiction is physical power. . . ." *McDonald v. Mabee* (1917) 243 U. S. 90, 91, 37 Sup. Ct. 343. See in general Scott, *Fundamentals of Procedure in Actions at Law* (1922) ch. I.

What Mr. Justice Holmes probably had in mind when he made these statements was a territorial theory of the law. If state A through its officers seized an individual, X, in state B, that would clearly be a violation of an international duty toward state B. Since state A does not have the privilege nor perhaps the power to effect such a seizure, one might say that state A did not have "potential physical control" of X. This seems to have had some influence in the shaping of the territorial notion that the courts of state A will not ordinarily exercise jurisdiction in a civil case in which X is the defendant nor order "service of process" on X in state B in a suit by a resident of state A. Such a limitation—apparently self-imposed—is not necessarily justified on policy nor does it seem sound on analysis. If such a proceeding—suit and notice to X in state B—were allowed, and judgment rendered for the plaintiff, a change in the legal relations of X at least in state A would be effected. See *supra* note 5 and text. The mere transmission of knowledge to X in state B is not a breach of duty by state A toward state B. A classic instance of this is found in the exercise of the *ius avocandi* in state B by a consular representative of state A. See Borchard, *The Diplomatic Protection of Citizens Abroad* (1915) sec. 346. But this notion of territoriality or "potential physical control" of the person has had at least an unconscious influence in the course of judicial decision and has been strictly adhered to in many instances.

[7] "But when that power exists and is asserted by service at the beginning of a

still persists and is the framework of the bulk of rules governing service of process; the language of the courts is still to the effect that actual knowledge of a pending action and ample opportunity to defend will not necessarily dispense with the requirement.[8] But a tendency may nevertheless be observed to make knowledge of a pending suit and full opportunity to defend in conjunction with other facts the *raisons d'être* of service of process. Exceptions are carved out of the older notion in subservience to the modern tendency. The older notion and the present tendency are not always well recognized; inconsistent argumentation seems inevitable, and the one or the other is adopted by the court to effectuate justice in the particular litigation. The problem is brought to a head when nonresidents are concerned. If potential physical control is necessary to justify the court in exercising jurisdiction, then it is almost hopeless to attempt to proceed against a nonresident. But if the sole object of service of process is assumed to be notice, and service is not possible, then actual notice brought home to the defendant in any other way, provided other necessary facts are present, should suffice. The interplay of these two elements is evident in the mass of decisions on the subject in all its phases.[9]

Since at common law a court will not ordinarily exercise jurisdiction over the person of anyone beyond its territorial limits, statutes providing for substituted service at the last known place of abode of the defendant within the state or constructive service by publication so as to justify or compel the exercise of such jurisdiction at once suggest themselves. In the United States, the problem of such service is inextricably connected with questions of constitutional law, namely, whether there has been a compliance with the due process clause,[10] or with the privileges and immunities clauses of the Federal Constitution.[11] It seems as an original question that the only constitutional complaint the defendant might have would be with reference to a want of reasonable notice of the suit and an adequate opportunity to defend and that the pertinent

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cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not." Holmes, J., in *Mich. Trust Co. v. Ferry, supra* note 6, at p. 353, 33 Sup. Ct. at p. 552. ". . . . in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and . . . submission to the jurisdiction by appearance may take the place of service upon the person." Holmes, J., in *McDonald v. Mabee, supra* note 6, at p. 91, 37 Sup. Ct. at p. 343. See *supra* note 6.

[8] *Cf. infra* note 38.

[9] See further *In re Busfield* (1886, C. A.) L. R. 32 Ch. Div. 123; Beale, *The Jurisdiction of Courts over Foreigners* (1913) 26 HARV. L. REV. 193, 283, 284; Scott, *Jurisdiction over Nonresidents Doing Business within a State* (1919) 32 *ibid.* 871. Under the French law, jurisdiction is exercised at the domicile of the plaintiff in personal actions and actions as to movables. See Pillet, *Jurisdiction in Actions between Foreigners* (1905) 18 HARV. L. REV. 325, 334 *et seq.*

[10] U. S. Const. Amend. XIV, sec. 1.

[11] U. S. Const. Art. IV, sec. 2; *ibid.* Amend. XIV, sec. 1.

clauses of the Constitution were not intended to enlarge in scope the old notion of potential physical control of the person.[12] But such has not been the course of constitutional interpretation, though frank recognition of the present tendency is evident in the emphasis which is given to it in the making of exceptions. In *Pennoyer v. Neff*[13] it was stated that a judgment *in personam* rendered against a nonresident upon constructive service of process would be a denial of due process. Although mere *dictum*,[14] this statement became the foundation of the law later developed. The court in that case, in considering the difference between actions *in rem* and actions *in personam*,[15] intimated that vicarious service would be more likely to result in actual notice to the defendant in the former classes of actions than in the latter.[16] This hardly seems tenable[17] and is doubtful as a reason in the retrospect of history;[18]

[12] What other facts are necessary to give or justify the exercise of jurisdiction is beyond the scope of the present discussion. Wherever it is stated herein that notice of the suit and an adequate opportunity to defend should suffice, it is assumed that such other operative facts exist.

[13] (1877) 95 U. S. 714. See also *Grubel v. Nassauer* (1913) 210 N. Y. 149, 103 N. E. 1113.

[14] The case arose before the Fourteenth Amendment became operative.

[15] Proceedings and judgments *in rem, quasi in rem,* and *in personam* have been the subjects of many discussions. See Scott, *loc. cit. supra* note 6; Hohfeld, *Fundamental Legal Conceptions* (1923) 102 *et seq.;* Cook, *op. cit. supra* note 2, at pp. 37, 106, *passim.* In actions *in rem,* the court is not troubled over personal service on a nonresident, for the state's potential physical control of the *res*—land, chattel—is the operative fact. But here also due process is denied if reasonable notice of the suit is lacking. *Roller v. Holly* (1900) 176 U. S. 398, 20 Sup. Ct. 410. So far as notice in any sort of action is concerned, even the common law seems to have required that "natural justice" be done. See *McDonald v. Mabee, supra* note 6, at p. 91, 37 Sup. Ct. at p. 343. See also *Feyerick v. Hubbard* (1902) 71 L. K. B. 509, 512; but *cf. Douglas v. Forrest* (1828, C. P.) 4 Bing. 686. For the meaning of "natural justice," see Corbin, *Rights and Duties* (1924) 33 YALE LAW JOURNAL, 501, 503, 504. See in general COMMENTS (1922) 31 YALE LAW JOURNAL, 425; 24 L. R. A. (N. S.) 1279, note.

The enlargement of the category of actions *in rem* seems to be one of the judicial processes devised to justify the courts in applying more flexible rules. Thus, a "status" is conceived of as a *res* and an action involving a "status" is universally denominated *in rem.* "The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on with its territory." *Pennoyer v. Neff, supra* note 13, at p. 734 (*dictum*). *Cf.* 2 Bishop, *Marriage, Divorce, and Separation* (1891) secs. 140-142, 554. Since society has such a concern in the relation between husband and wife, it is not hard to imagine a case where a nonresident recalcitrant spouse could otherwise check necessary societal action. *Cf.* Beale, *Progress of the Law, 1918-1919—The Conflict of Laws* (1919) 33 HARV. L. REV. 1, 12, 13.

[16] "The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." *Pennoyer v. Neff, supra* note 13, at p. 727.

[17] Justice Hunt, *dissenting,* answered the majority thus: "Such seizure is not in itself notice to the defendant, and it is not certain that he will by that means

and yet the implication that to-day notice is the rational basis of the institution is not to be ignored. The court inadvertently betrayed the inadaptability of the old notion under present conditions.

But there are many different situations where different rules have been deemed applicable. Thus, a nonresident can remove the disability of the court or justify the court in exercising jurisdiction where it exists by his factual consent by accepting service of process,[19] or by defending on the merits,[20] or even by assenting in advance to waive the requirement of service, as by confession of judgment by an attorney.[21] If the absent defendant is a resident of the state in which action has been brought, notice by publication will suffice to justify the court in exercising jurisdiction.[22] Once the court has acquired or exercised jurisdiction over a nonresident, the latter is liable to any sort of process

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receive notice. Adopted as a means of communicating it, and although a very good means, it is not the only one, nor necessarily better than a publication of the pendency of the suit, made with an honest intention to reach the debtor." *Pennoyer v. Neff, supra* note 13, at p. 747. And see COMMENTS (1917) 26 YALE LAW JOURNAL, 492.

[18] See *supra* note 6; *cf. supra* note 15.

[19] Beale, *op. cit. supra* note 9, at p. 297. The English courts will give effect to a judgment of a foreign tribunal where the defendant has assented in advance to the sort of proceedings used and to the exercise of jurisdiction by the foreign tribunal in accordance with the law of the foreign country. *Copin v. Adamson* (1874) L. R. 9 Exch. 345; *Rousillon v. Rousillon* (1880) L. R. 14 Ch. Div. 351; *Feyerick v. Hubbard, supra* note 15. Under the English Rules of Court, jurisdiction will now be exercised over nonresidents in certain classes of actions *in personam*. See generally Dicey, *Conflict of Laws* (3d ed. 1922) 250 *et seq.*

[20] *Harris v. Taylor* [1915, C. A.] 2 K. B. 580; *cf. Harrison v. Farrington* (1882, Ch.) 35 N. J. Eq. 4; *Chic. Life Ins. Co. v. Cherry, supra* note 2. But if appearance is for the express and sole purpose of contesting "jurisdiction," the defendant is not deemed to have waived his privilege or his immunity. Beale, *op. cit. supra* note 9, at p. 298. See also COMMENTS (1919) 28 YALE LAW JOURNAL, 579.

[21] *Hazel v. Jacobs* (1910) 78 N. J. L. 459, 75 Atl. 903 (not clear whether waiver of privilege merely or of immunity also, since no discussion of due process clause); and see (1924) 73 U. PA. L. REV. 98; 38 L. R. A. (N. S.) 814, note. A written acceptance of service upon a nonresident by the latter's attorney will not justify the exercise of jurisdiction where the latter lacks authority to accept. *Dolber v. Young* (1923, N. H.) 123 Atl. 218 (no mention of constitutional question, though talk of "jurisdiction"); see (1924) 10 VA. L. REV. 559; and *cf.* NOTES (1923) 23 COL. L. REV. 765.

[22] *Henderson v. Staniford* (1870) 105 Mass. 504; *contra: De la Montanya v. De la Montanya* (1896) 112 Calif. 101, 44 Pac. 345 (though *Pennoyer v. Neff, supra* note 13, was referred to with approval, no emphasis was placed on the question of the constitutionality of the California statute under the due process clause); see *Raher v. Raher* (1911) 150 Iowa, 511, 129 N. W. 494 (Iowa statute unconstitutional under due process clause, hence lack of jurisdiction). And see 35 L. R. A. (N. S.) 292. There is hardly any justification for the minority rule when the defendant deliberately leaves the state to evade service of process. But if the defendant's absence is accompanied by an intent not to return, it seems that such service is operative; but *query* whether substituted service at the defendant's last and usual place of abode would suffice. *McDonald v. Mabee, supra* note 6,

arising out of the litigation.[23] And so a nonresident temporarily within the state is liable to actual service of process[24] except when he has been inveigled there by the fraud of the plaintiff.[25]

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at pp. 92, 93, 37 Sup. Ct. at p. 344; see L. R. A. 1917 C, 1143, note. See further NOTES (1911) 11 COL. L. REV. 352; *cf.* COMMENTS (1917) 26 YALE LAW JOURNAL, 492.

[23] Beale, *op. cit. supra* note 9, at p. 299; see *Chic. Life Ins. Co. v. Cherry, supra* note 2, at pp. 29, 30, 37 Sup. Ct. at p. 493. Such proceedings "are considered as rather a continuation of the original litigation than the commencement of a new action." *Pennoyer v. Neff, supra* note 13, at p. 734 (*dictum*); *cf.* (1924) 10 VA. L. REV. 559, 560. In *Mich. Trust Co. v. Ferry, supra* note 6, at p. 353, 33 Sup. Ct. at p. 552, Mr. Justice Holmes said: "It is within the power of a State to make the whole administration of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution. . . ." See also *supra* note 7.

[24] *Fisher, Brown & Co. v. Fielding* (1895) 67 Conn. 91, 34 Atl. 714. But not if he is going to or coming from court as a witness, the policy being to encourage the appearance of witnesses. *Prescott v. Prescott* (1923, N. J. Ch.) 122 Atl. 611; see (1924) 22 MICH. L. REV. 849. Nor will jurisdiction be exercised over a domestic or foreign corporation where such a witness is one of its officers and a nonresident, whose presence is not demanded by any other business of the corporation. *Hammons v. Super. Ct.* (1923) 63 Calif. App. 700, 219 Pac. 1037; see (1923) 12 CALIF. L. REV. 63; (1924) 37 HARV. L. REV. 631. See also (1922) 22 COL. L. REV. 598. Nor can the defendant be served in such manner to appear before a federal court while returning as a witness from a state court in the same district. *Page Co. v. Macdonald* (1923) 261 U. S. 446, 43 Sup. Ct. 416; see (1923) 23 COL. L. REV. 687. But a nonresident is not immune from service of process where his presence in the state is due to a desire to listen to the argument of an appeal in a case in which he is a litigant. *Sampson v. Graves* (1924, Sup. Ct. Spec. T.) 122 Misc. 314, 204 N. Y. Supp. 212, *affirmed* without opinion (1924, App. Div. 1st Dept.) 204 N. Y. Supp. 945; see (1924) 24 COL. L. REV. 680. See further Lorenzen, *Cases on the Conflict of Laws* (2d ed. 1924) 129, note.

[25] *Cavanagh v. Manhattan Transit Co.* (1905, C. C. D. N. J.) 133 Fed. 818 (secretary of foreign corporation served at close of business interview with plaintiff's agent, to which he had been invited); see *Union Sugar Refinery Co. v. Mathiesson* (1864, D. Mass.) 2 Cliff. 304, 307 (service at close of interview, insufficient evidence of deception); *Taylor, Petitioner* (1908) 29 R. I. 129, 131, 69 Atl. 553, 554 (finding that no fraud). And so where deceit is practiced to induce the defendant to send his assets into the state where they can be attached. *Van Donselaar v. Jones* (1923) 195 Iowa, 1081, 192 N. W. 22. But where a defendant comes into the state for the purpose of being present at the taking of a deposition, taken according to notice, if service would otherwise be good, it is not made bad by the fact that notice was given for the sole purpose of inducing the defendant to enter the state. *Jaster v. Currie* (1905) 198 U. S. 144, 25 Sup. Ct. 614. See also *Siro v. American Express Co.* (1923) 99 Conn. 95, 121 Atl. 280; see (1923) 23 COL. L. REV. 689; (1923) 22 MICH. L. REV. 170.

In this connection, Professor Beale observes that "though it is ordinarily said that in this case the courts of the state into which a party is inveigled by fraud have no jurisdiction over him, the truth is that there is no defect of jurisdiction, but the fraud of the judgment plaintiff is the basis of an equitable plea in bar of the judgment; and this is proved by the fact that if the fraud is that of a third party, and does not personally charge the judgment plaintiff, the judgment is perfectly good in spite of the fact that the judgment defendant was fraudulently

The industrial evolution of the nineteenth century with large-scale production paved the way for an increase in corporate enterprises. As corporations extended their activities into other states, legal relations were created with the inhabitants of those states. A rigid adherence to the general notions regarding service of process would have obviously meant little if any successful litigation against foreign corporations. An unconscious adaptation to the changing situation took place, according as exigencies demanded.[26] There is a wealth of theoretical discussion as to when and how service is to be effected on a foreign corporation. Doubtless if a foreign corporation could be within the state of the forum in the same sense as a nonresident individual,[27] there might be little dispute as to its liability to service of process. The English courts have found no difficulty in attributing to a corporation plurality of "domicile" for the purpose of exercising jurisdiction[28] and in having service made on a proper agent in charge of the local business; but there is some doubt as to whether this view or a previous-consent theory is at the basis of the American decisions.[29] The American courts almost as

inveigled into the state. It would seem, then, that in the case of fraud there is no real exception to the general principle that a foreigner personally found within the territory of a sovereign is subject to the jurisdiction of his courts." *Op. cit. supra* note 9, at pp. 285, 286. The cases make little if any attempt to distinguish between lack of jurisdiction and mere refusal to exercise such jurisdiction, even though it exists, to avoid perpetrating an injustice in the particular case. It seems that if the case arose or arises under the Fourteenth Amendment, there is a jurisdictional defect. To be sure, such lack of power has to be brought to the notice of the court, *e.g.*, by "an equitable plea in bar of the judgment"; and failure to do so will result in the court's exercising "jurisdiction" over him and, *ceteris paribus*, rendering judgment for the plaintiff. But in the definition of any legal relation it is assumed as a mere matter of convenience that the proper procedural machinery will be successfully set in motion; definitions of legal relations are necessarily predicated upon such an assumption. *Cf.* Gray, *The Nature and Sources of the Law* (2d ed. 1921) 106; Willoughby, *The Fundamental Concepts of Public Law* (1924) 144, 145, and note.

[26] See in general Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry on Business Within the Territory* (1917) 30 HARV. L. REV. 676.

[27] See *supra* note 24 and text.

[28] *Dunlop Pneumatic Tyre Co. v. Actiengesellschaft etc. Co.* [1902, C. A.] 1 K. B. 342: "It [a foreign corporation] can only so reside [in England] through its agent, not being a concrete entity itself; but, if it so resides by its agent, it must be considered for this purpose as itself residing within the jurisdiction." Collins, M. R., at p. 347. "A corporation can, of course, only be said to reside anywhere in a figurative sense, and it has been held for the present purpose to reside in a place where it carries on its business." Mathew, L. J., at p. 349.

[29] See Cahill, *op. cit. supra* note 26, at p. 686 *et seq.*, where statutes also are discussed. *St. Clair v. Cox* (1882) 106 U. S. 350, 1 Sup. Ct. 354, seems to have proceeded on both these theories. See also *B. & Q. R. R. v. Harris* (1870, U. S.) 12 Wall. 65. That the notion of a previous consent is a mere fiction was recognized in *Pa. Fire Ins. Co. of Phila. v. Gold Issue & M. Co.* (1917) 243 U. S. 93, 96, 37 Sup. Ct. 344, 345, where Mr. Justice Holmes said, ". . . this consent is a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defence. Presumably the fiction was adopted to reconcile the intimation with the general rules concerning jurisdiction." The learned

a unit seized upon the fact that the corporation is a creature of the state; that its privileges and powers are in general enumerated; and that since a state has the privilege to exclude from its borders any foreign corporation,[30] it follows that it can impose conditions upon their admission, such as liability to the jurisdiction of the courts. But this privilege wholly to exclude does not always obtain, especially where the corporation is engaged solely in interstate commerce, though even in the latter case some conditions can be imposed in certain instances.[31] Judge Learned Hand has pierced through this formula of consent and suggested a matter-of-fact theory, namely, public necessity and convenience.[32] Parallel with this development has been a growth of law on what constitutes "doing business" in the state by a corporation.[33] Diffi-

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Justice in fact conceded the soundness of the view as to consent advanced by Judge Learned Hand. See *infra* note 32. See in general COMMENTS (1924) 33 YALE LAW JOURNAL, 547.

[30] *Paul v. Virginia* (1869, U. S.) 8 Wall. 168. The reason is that a corporation is not a citizen and hence does not enjoy the protection of the privileges and immunities clauses. As an original question, the conclusion might seem to be doubtful. See Cahill, *op. cit. supra* note 26, at p. 701, note 81. *Cf.* also *infra* note 38.

[31] This point is fully treated in Scott, *op. cit. supra* note 9, at p. 878. Such conditions are not to result in unreasonable burdens on interstate commerce. *Davis v. Farmers Co-operative Equity Co.* (1923) 262 U. S. 312, 43 Sup. Ct. 556; see COMMENTS (1924) 33 YALE LAW JOURNAL, 547.

[32] In *Smolik v. Phila. R. C. & I. Co.* (1915, S.D.N.Y.) 222 Fed. 148, 151, he said: "One [referring to arguments of counsel] must be vicious, and the vice arises I think from confounding a legal fiction with a statement of fact. When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent." And he concluded: "The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited. . . . The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and, when that meaning calls for wide application, such must be given." How far the courts will be willing to take this realistic attitude is problematic. Beale, *op. cit. supra* note 15, at p. 11.

[33] The English courts have had to wrestle with the same problem. *Cf. supra* note 28. In the following cases, the foreign corporation was deemed to be "doing business" in England: *Dunlop Pneumatic Tyre Co. v. Actiengesellschaft etc. Co., supra* note 28 (conduct of "stand" for exhibition of articles of manufacture at cycle show which lasted nine days, in charge of agent who took orders and pressed sales generally); *Saccharin Corp. v. Chemische Fabrik von Heyden Actiengesellschaft* [1911, C. A.] 2 K. B. 516 (fact that representative was agent for another firm, form of his remuneration, fact that place of business occupied without payment of rent immaterial; representative had power to make

culties have cropped up in borderline cases; similar factual situations have given rise to crystallized rules of law.[34] The result in most cases seems to have followed from some "inarticulate major premise" in the mind of the court as to what is just or unjust.

There are enormous possibilities in the broad view elucidated by Judge Learned Hand.[35] Assuming that it is sound, it might be urged that it should be applicable to cases of foreign partnerships and nonresident individuals.[36] But the courts have adopted a rule contrary to those which prevail in the case of foreign corporations, traceable to the commonplace notion that members of a partnership and individuals are within the protection of the privileges and immunities clauses of the Constitution[37] and hence may not be excluded from doing business in other states.[38] Even in an action for personal injuries caused within

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contracts); *Actiesselskabet Dampskib "Hercules" v. Grand Trunk Pac. Ry.* [1912, C. A.] 1 K. B. 222 (funds invested and capital and bonds issued by London committee; fact that no rent paid for premises immaterial).

[34] Among the American cases involving this specific problem, see *St. Clair v. Cox, supra* note 29; *Mut. Reserve Life Assoc. v. Phelps* (1903) 190 U. S. 147, 23 Sup. Ct. 707; *Smolik v. Phila. & R. C. & I. Co., supra* note 32; *Pa. Fire Ins. Co. of Phila. v. Gold Issue M. & M. Co., supra* note 29; see also *Chipman v. Jeffrey Co.* (1920) 251 U. S. 373, 40 Sup. Ct. 172; *Davis v. Farmers Co-Operative Equity Co., supra* note 31. See in general Osborne, *"Arising out of Business Done in the State"* (1923) 7 MINN. L. REV. 380; NOTES AND COMMENT (1923) 8 CORN. L. QUART. 263; COMMENTS (1924) 33 YALE LAW JOURNAL, 547; (1922) 22 COL. L. REV. 83; (1922) 22 *ibid.* 598; (1921) 35 HARV. L. REV. 87; (1924) 37 *ibid.* 631; (1923) 22 MICH. L. REV. 77; (1921) 31 YALE LAW JOURNAL, 205; (1922) 31 *ibid.* 336. *Cf.* L. R. A. 1916 F, 410, note.

[35] See *supra* note 32.

[36] *Cf.* Beale, *op. cit. supra* note 15, at pp. 11, 12. In *Pennoyer v. Neff, supra* note 13, at p. 735, there is a strong *dictum* to the effect that a nonresident entering into a partnership or association within the state or making contracts enforceable there could be required to appoint an agent to receive service of process in proceedings instituted with respect to such partnership, association or contracts, or to designate a place where such service could be made and notice given; and it could be provided that on failure to make such appointment or designate such place, service could be made on a public officer designated for that purpose or in some other prescribed way. But the trend of judicial decision has been otherwise. See *infra* note 43.

[37] See *supra* notes 10, 11.

[38] The cases which purport to be based on this proposition are not quite satisfactory upon a close examination of the particular situation. In *Brooks v. Dun* (1892, C. C. W. D. Tenn.) 51 Fed. 138, the conclusion is a mere *dictum* since the court first found as a matter of construction that the state statute governing service of process did not apply. In *Caldwell v. Armour & Co.* (1899, Del. Super. Ct.) 1 Pen. 545, 43 Atl. 517, the court was troubled by the fact that the statute applied equally to causes of action arising out of the state as within. It was afraid to indulge in judicial legislation by holding the statute severable; yet that has been done quite frequently in the case of foreign corporations. See Scott, *op. cit. supra* note 9, at p. 890. The court concluded that probability of actual notice, or actual notice, of pendency of the action was therefore immaterial. It seems it was carrying over into the constitutional problem the old notion of poten-

the state the rule as to partnerships has operated unyieldingly and in that way manifested its worst aspects.[39] The courts have not clearly enumerated these "privileges and immunities."[40] Maybe service on an agent of a partnership is operative where the defendant partnership "resides" in a distant state and may never have been within the state of the forum.[41] The number of citizens of a particular state "residing" beyond its limits and upon whom service by leaving a copy with an agent would be sufficient is comparatively so small as not to justify such sort of service on nonresidents who are not citizens.[42] A leaning in favor of the orthodox rule is evident in a late decision of the United States Supreme Court.[43] The stern insistence upon the difference in character between a foreign corporation and a foreign partnership as regards the state's privilege to exclude is at the root of the difference in rules;[44] but one cannot, it seems, escape the fact that there is a difference in situation between resident partners and individuals and nonresident partners and individuals that should justify a difference in treatment with respect to service of process unless one is to cling tenaciously to the old notion of potential physical control of the person.[45] Whether much resentment will be aroused against the rule will depend upon the number of instances in which it will be called into play.

In this state of the law, the Supreme Judicial Court of Massachusetts in *Pawloski v. Hess* (1924) 144 N. E. 760,[46] was called upon to face the problem in another aspect. In that case, the sole question before

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tial physical control of the person. See *supra* note 6. In *Cabanne v. Graf* (1902) 87 Minn. 510, 92 N. W. 461, though the statute was applicable to nonresident individuals, associations and corporations, the sole question before the court was its constitutionality with respect to an individual. The question was expressly left open with respect to associations and copartnerships, "quasi legal entities," to the extent of binding their assets within the state.

[39] *Aikmann v. Sanderson & Porter* (1908) 122 La. 266, 47 So. 600.

[40] But *cf. Slaughter-House Cases* (1873, U. S.) 16 Wall. 36. See in general McGovney, *Privileges or Immunities Clause—Fourteenth Amendment* (1918) 4 IOWA L. BUL. 219.

[41] This situation is given hypothetically in *Caldwell v. Armour & Co., supra* note 38, at p. 548, 43 Atl. at p. 518.

[42] See *Mordock v. Kirby* (1902, C. C. W. D. Ky.) 118 Fed. 180, 182.

[43] *Flexner v. Farson* (1919) 248 U. S. 289, 293, 39 Sup. Ct. 97, 98, where Mr. Justice Holmes said: "But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in." For a criticism of the reasoning in that case and expressions of belief that the decision is sound on its facts, but that many of the statements made are merely *dicta* and that the question may be regarded as still open in the Supreme Court, see Scott, *op. cit. supra* note 9, at p. 877 *et seq.;* and see Beale, *op. cit. supra* note 15, at pp. 11, 12; Burdick, *Service as a Requirement of Due Process in Actions in Personam* (1922) 20 MICH. L. REV. 422, 423 *et seq.* See also (1919) 3 MINN. L. REV. 277; (1919) 28 YALE LAW JOURNAL, 512.

[44] See *supra* note 43.

[45] See *supra* note 6.

[46] See (1924) 38 HARV. L. REV. 111.

the court was the constitutionality of a state statute providing for service of process upon the Registrar of Motor Vehicles in an action against a nonresident operator of a motor vehicle arising out of an accident involving the defendant while operating such motor vehicle on the highways of Massachusetts.[47] Although that statute contains recitals of the consent-theory, one cannot overlook the ample safeguards provided for giving the defendants notice of the suit. The emphasis placed upon notice is in accordance with the trend previously referred to[48] and away from the potential physical-control notion. If the defendant could have been found within Massachusetts at the time of action brought, there is some doubt whether service in accordance with the statute would have been constitutional in view of the possibility of effecting personal service.[49] The Massachusetts court had little precedent on which to rely.[50] In the opening portions of its opinion, it stressed the many problems created by reason of the presence of motor vehicles on the highways and asserted in effect that the police power to be exercised in view of the situation was paramount over other considerations.[51] Whether one

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[47] "The acceptance by a non-resident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such nonresident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle in such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service . . . . shall be made by leaving a copy . . . . in the hands of the registrar, or in his office. . . . Provided, that notice . . . . and a copy . . . . are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration. The court . . . . may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action." Mass. Acts, 1923, c. 431, sec. 2.

[48] See also *supra* note 12.

[49] As was done in *Fisher, Brown & Co. v. Fielding, supra* note 24.

[50] In the one case in point and on which the Massachusetts court relied, *Kane v. New Jersey* (1916) 242 U. S. 160, 37 Sup. Ct. 30, the statute provided that the nonresident owner file with the Secretary of State an instrument "constituting" the latter and successors in office his attorney upon whom process could be served "in any action or legal proceeding caused by the operation of his registered motor vehicle, within this State, against such owner." Mr. Justice Brandeis placed his decision squarely on the ground that the presence of the automobile on the highway has given rise to many evils and that the statute in question was reasonably adapted to cope with some phases of that evil. See Scott, *op. cit. supra* note 9, at p. 886 *et seq.;* Burdick, *op. cit. supra* note 43, at p. 425; COMMENT (1917) 5 CALIF. L. REV. 252; (1917) 26 YALE LAW JOURNAL, 422.

[51] See *supra* note 50. *Cf. The Automobile—Its Province and Problems* (1924) 116 THE ANNALS, 169-198.

calls this a delimitation of the old view or the formulation of a new one for a class of cases *sui generis,* the decision is unquestionably sound. The case well supports the proposition that the law follows the mores.[52]

INDEMNITY AND CONTRIBUTION BETWEEN JOINT TORT FEASORS

The longevity of principles of law is not always measured by their utility as judged by reference to decisions under them. The spell cast by the euphonious phrasing of a rule long after the exceptions to that rule have cut away its usefulness is exemplified by the decision in the case of *Horrabin v. City of Des Moines* (1924, Iowa) 199 N. W. 988. A contractor was engaged by a municipality to construct a bridge, the city engineer designating the termini of the bridge. In locating the bridgeheads at these points the contractor trespassed on another's land, and the injured party recovered a joint judgment against the city and the contractor.[1] The contractor having paid the judgment, here sought indemnity against the city. Though the law governing the point of the case has been well settled for at least a century,[2] the court in allowing the indemnity felt obliged to invoke the principle "there can be no indemnity or contribution between joint tort feasors," and then to enumerate the many "exceptions" to the rule in order to find a pigeon hole for the instant case.

In the leading case of *Merryweather v. Nixan,*[3] Lord Kenyon said that ". . . no contribution could by law be claimed as between joint wrongdoers."[4] An inclination to use the concepts of indemnity and contribution interchangeably,[5] probably aided by Lord Kenyon's inference that the courts should never aid a "wrongdoer," resulted in the

[52] It has been suggested that Congress has the power to provide for service in other states of state process in civil actions. See Cook, *The Powers of Congress under the Full Faith and Credit Clause* (1919) 28 YALE LAW JOURNAL, 421, 428 *et seq.* This seems to be an effective method for remedying the unfortunate situations discussed herein.

[1] The problem of indemnity and contribution between joint tort feasors would be considerably simplified could the damages be apportioned in the judgment for the injury as is sometimes done by the courts of Admiralty. However, at common law, since the whole question is the right of recovery of the injured party, the law gives the plaintiff his recovery against all or any of the tort feasors. (1923) 33 YALE LAW JOURNAL, 213.

[2] *Adamson v. Jarvis* (1827, C. P.) 4 Bing. 66.

[3] (1799, K. B.) 8 T. R. 186.

[4] In considering the present day application of this century old rule, it is well to bear in mind that the concept of "wrongdoer" in Lord Kenyon's day is not at all synonymous with our own concept of "tort feasor," our concept being a much wider and more inclusive one. Reath, *Contribution between Persons Jointly Charged for Negligence* (1899) 12 HARV. L. REV. 176.

[5] It seems advisable to make the same distinction between "indemnity" and "contribution" here, as is made in other branches of the law. To indemnify, is to save harmless. To contribute, is to share the burden.

courts interpreting the rule thus announced as "there is no contribution or indemnity between joint tort feasors."[6] The decisions whether dealing with indemnity or contribution cite the original pronouncement as ruling the cases. In the intervening years the courts by the device of "exceptions" have demolished the rule,[7] yet it remains in the law to be argued down by each new decision. This condition invites an attempt to analyze the decisions,[8] for the purpose of ascertaining exactly to what extent this rule really helps us to decide cases. We shall first consider the rule as applied to indemnity.

A *dictum* set out in the leading case[9] almost immediately became the basis of the first exception to the general rule. The servant or agent who acts at the command of his master or principal, the act being one that he cannot be expected to have known was wrongful, may have indemnity.[10] For a similar reason the master or principal, held liable for the tort of his servant or agent, unless such tort was specifically ordered by him, may have indemnity against such servant or agent.[11]

A second exception covers an analogous class of cases where because of statute, franchise, charter, or contract, one party is primarily responsible, but is subjected to that responsibility through the negligence of another whose act was the real cause of the injury. This exception covers a wide variety of cases; a municipality may have indemnity from an individual whose act in misusing a sidewalk caused injury for which the city was held liable;[12] a gas company charged with the duty of not allowing gas to escape may recover from a street railway company

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[6] *Horrabin v. City of Des Moines* (1924, Iowa) 199 N. W. 988, 990; see also *Adamson v. Jarvis, supra* note 2.

[7] "The maxim is now subject to so many limitations that, stated without qualifications, it can hardly be recognized as a rule of law." Woodward, *Quasi Contracts* (1913) 402. "Indeed, we think this maxim too much broken in upon at this day to be called with propriety a rule of law." *Bailey v. Bussing* (1859) 28 Conn. 455, 459; and to the same effect, 1 Cooley, *Torts* (3d ed. 1906) sec. 167; Keener, *Quasi Contracts* (2d ed. 1893) 408, *et seq.;* 40 L. R. A. (N. S.) 1147.

[8] Classifications and "exceptions" are almost as numerous as the decisions and writings on the point. An attempt has been made herein to group many of these "exceptions" where it seems possible to apply the same rule to several.

[9] *Merryweather v. Nixan, supra* note 3, at p. 186, ". . . this decision would not affect cases of indemnity where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right."

[10] *Adamson v. Jarvis, supra* note 2; *Hoggan v. Cahoon* (1903) 26 Utah, 444, 73 Pac. 512; 1 Mechem, *Agency* (2d ed. 1914) sec. 1603.

[11] *Grand Trunk v. Latham* (1874) 63 Me. 177; *Smith v. Foran* (1875) 43 Conn. 244; *Ga. South and Fla. Ry. v. Jossey* (1898) 105 Ga. 271, 34 S. E. 664; *N. Y. Consol. Ry. v. Mass. Bonding and Ins. Co.* (1920, 2d Dept.) 193 App. Div. 438, 184 N. Y. Supp. 243, with excellent note of the case in NOTES AND COMMENT (1922) 6 CORN. L. QUART. 339; see *Bradley v. Rosenthal* (1908) 154 Calif. 420, 423, 97 Pac. 875, 876; *Betcher v. McChesney* (1917) 255 Pa. 394, 398, 100 Atl. 124, 125; 2 Cooley, *op. cit. supra* note 6, at p. 1172.

[12] *Washington Gas Light Co. v. Dist. of Columbia* (1895) 161 U. S. 316, 16 Sup. Ct. 564.

whose negligence caused the leak in the pipe.[13] The owner of a house may recover from a company that illegally attached wires to his chimney causing it to fall and injure another.[14] In such cases, indemnity is universally allowed.[15]

The third group comprises those cases where the negligence of the plaintiff is the basis of the tort liability for which he has been held.[16] Cases involving successive negligent acts, and refusing indemnity are cited as authority for the "no contribution" rule. Cases allowing indemnity are treated as "exceptions." That the rule of *Merryweather v. Nixan* is superfluous in all of these cases may appear from a consideration of a simple hypothetical problem. A, while negligently conducting himself, is injured by B who is negligently driving his automobile. Despite A's contributory negligence, A may recover full damages from B if A can prove that B had the last clear chance to avoid.[17] Oppositely, under such a state of facts, B cannot recover from A for damage to his automobile. The principle "there can be no contribution or indemnity between joint tort feasors" has never been applied to such a state of facts. In the same case, suppose that in addition to A's suffering bodily injury, he is hurled against C who is not negligent, and who is injured thereby. C having sued both A and B has recovered a judgment which A has paid. In a suit by A against B there would seem to be no more reason for invoking the "no contribution" rule against A's recovery for the damages paid to C, than against recovery for injury to A himself. Oppositely, if B has paid the judgment, since he cannot recover for the damage to his automobile, there is no valid reason why A should pay for the injury to C, and hence no valid reason why the "no contribution" rule should be cited as governing the decision, when, at most, it merely describes the result in the particular case. The excellent decision which first suggested this reasoning has unfortunately been

[13] *Philadelphia Co. v. Central Traction Co.* (1895) 165 Pa. 456, 30 Atl. 934.

[14] *Gray v. Boston Gas Light Co.* (1873) 114 Mass. 149.

[15] *Lowell v. Boston and Ry.* (1839, Mass.) 23 Pick. 24; *Robbins v. Chicago City* (1866, U. S.) 4 Wall. 657; *City of Rochester v. Montgomery* (1878) 72 N. Y. 65; *C. & N. W. Ry. v. Dunn* (1882) 59 Iowa, 619, 13 N. W. 722; *Phoenix Bridge Co. v. Creem* (1905, 2d Dept.) 102 App. Div. 354, 92 N. Y. Supp. 855, aff'd. (1906) 18 N. Y. 580, 78 N. E. 1110; *Hart Township v. Noret* (1916) 191 *Mich.* 427, 158 N. W. 17; see *Scott v. Curtis* (1909) 195 N. Y. 424, 88 N. E. 794; *City of Des Moines v. Des Moines Water Co.* (1920) 188 Iowa, 24, 175 N. W. 821; 4 Dillon, *Municipal Corporations* (5th ed. 1911) sec. 1728.

[16] Twenty-five years ago, it was stated that the rule of *Merryweather v. Nixan* was not applicable to negligence cases. Reath, *op. cit. supra* note 4. The writer seized upon the then recent case of *Palmer v. Wick and Pultney-town S. S. Co.* [1894, H. L.] A. C. 318, which came up to the House of Lords from Scotland, and rejected the rule in negligence cases. It was pointed out that only a few of the English and American cases citing the rule had been cases of negligence. In the meantime, however, the doctrine has been applied very generally to these cases.

[17] For a discussion of the doctrine of the last clear chance see COMMENTS (1920) 29 YALE LAW JOURNAL, 896.

neglected,[18] but it is encouraging to note that a few recent cases recognize that the ancient formula is a redundancy as applied to these negligence cases.[19] It is believed that the great majority of cases holding "no indemnity" upon close inspection of the facts would turn out to be cases in which upon well settled principles of negligence the plaintiff tort feasor would be denied a right of action for injury to himself.[20] Thus is the old rule kept alive by decisions which recite it, yet do not depend upon it.

The cases involving true contribution present a somewhat different problem, for in such cases, in words of the original rule, the plaintiff admits that he is a "wrongdoer," and that he should bear a part of the judgment debt paid to the third party. Even here, ways and means have been devised to assist some of these "wrongdoers." The cases divide themselves into several groups. Where the plaintiff has acted "wilfully" the principle of no contribution has been followed almost consistently.[21] And so, where acts constituted fraud,[22] publication of libel,[23] selling of intoxicants to an habitual drunkard,[24] allowing a vicious ram to run loose,[25] contribution has been denied. But even in this class of cases there have been occasional lapses.[26]

[18] *Nashua Iron Co. v. Worcester Ry.* (1882) 62 N. H. 159. But see comment that this case was at one time "anomalous." Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233. It is suggested that the case is no longer anomalous. See note 19.

[19] *B. and M. Ry. v. Brackett* (1902) 71 N. H. 494, 53 Atl. 304; *Hudson Valley Ry. v. Mechanicville Elec. Light and Gas Co.* (1917, 3d Dept.) 180 App. Div. 86, 167 N. Y. Supp. 428; *Knippenberg v. Lord & Taylor* (1920, 1st Dept.) 193 App. Div. 753, 184 N. Y. Supp. 785; (1921) 30 YALE LAW JOURNAL, 527; *Colo. and So. Ry. West Light and Power Co.* (1923) 73 Colo. 107, 214 Pac. 30.

[20] *Union Stock Yards Co. v. Ry.* (1905) 196 U. S. 217, 25 Sup. Ct. 226; *Larkin Co. v. Terminal Warehouse Co.* (1914, 1st Dept.) 161 App. Div. 262, 146 N. Y. Supp. 380; see cases holding "no contribution," *infra* note 32.

[21] Woodward, *op. cit. supra* note 7 sec. 256; Keener. *op. cit. supra* note 7, at p. 408.

[22] *Peck v. Ellis* (1816, N. Y.) 2 Johns. Ch. 131; *Miller v. Fenton* (1844, N. Y.) 11 Paige, 18; *Davis v. Gelhavs* (1886) 44 Ohio St. 69, 4 N. E. 593; *Boyer v. Bolender* (1899) 129 Pa. 324, 18 Atl. 127; *Fakes v. Price* (1907) 18 Okla. 413, 89 Pac. 1123.

[23] See *Arnold v. Clifford* (1835, C.C.A. R. I.) 2 Sumner, 238; *Atkins v. Johnson* (1870) 43 Vt. 78. In both of these cases there was an express contract of indemnity. The court refused to enforce the contract and stated that neither indemnity nor contribution could be had in such a case.

[24] *Johnson v. Torpy* (1892) 35 Neb. 604, 53 N. W. 575.

[25] *Spaulding v. Oakes* (1869) 42 Vt. 343. This was probably a case of negligence rather than the commission of a "wilful" wrong, but the court treats it as if it were "wilful," the parties knowing the vicious traits of the ram.

[26] See *Kolb v. National Surety Co.* (1903) 176 N. Y. 233, 68 N. E. 247. This was originally a case of malicious prosecution. One of the guilty parties allowed his appeal bondsman to pay the entire judgment. Though other facts assisted the court in its decision, a strong *dictum* indicated that the fact that a surety had paid the judgment would alone release the case from the restriction of the general rule, and allow the surety recovery against the other wrongdoer. This doctrine is apparently peculiar to New York. It has also been applied to negligence cases,

At this point Lord Kenyon's rule again gives way to other principles of law. Where one of several partners has paid a judgment recovered against all for the tort of a servant, he may have contribution from the other partners.[27] The same applies as between creditors who by mistake or negligence have instructed a sheriff to levy on property which does not belong to their debtor.[28] These cases, and the first group of indemnity cases mentioned above are governed by the same principle—*respondeat superior.*

If the tort feasors are all charged with certain continuing duties, and the injury results from an omission to act on the part of all of the tort feasors, contribution may be had. Two counties were jointly responsible for the upkeep of a bridge, and it was held that one might have contribution from the other when an injury resulted from their negligence in failing to repair.[29] Two adjoining landowners who jointly build a wall which collapses and injures another may have contribution.[30] Officers of a corporation who neglect to file reports according to statute, and afterwards are held responsible to creditors, will be required to contribute to one officer who has paid the entire amount.[31]

It has already been pointed out that as between two negligent tort feasors, the plaintiff may have indemnity where the defendant alone had the last clear chance to avoid. Conversely, where the plaintiff had the

and actually forced contribution, where otherwise there could have been none. *Rosenthal v. N. Y. Rys.* (1919, Sup. Ct. Spec. T.) 109 Misc. 5, 179 N. Y. Supp. 593; *City of White Plains v. Ellis* (1920, Sup. Ct. Spec. T.) 113 Misc. 210, 184 N. Y. Supp. 444. In the latter case the effect was to force the City of White Plains to contribute, whereas under the well settled rule in New York and elsewhere, *supra* note 15, the city was probably entitled to indemnity! (1921) 21 COL. L. REV. 292. *Fakes v. Price, supra* note 22, is another anomalous case where contribution for damages paid to a third party was refused, but contribution for the costs of the trial allowed.

[27] "We must look for personal participation, personal culpability, and personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law. the maxim of law that there is no contribution among wrongdoers is not to be applied." *Bailey v. Bussing, supra* note 7, at p. 459, a leading American case cited for nearly every phase of the subject of contribution between joint tort feasors. *Wooley v. Batte* (1826, N. P.) 2 Car. & P. 417; *Horback v. Elder* (1851) 18 Pa. 33; *Hobbs v. Hurley* (1918) 117 Me. 449, 104 Atl. 815.

[28] *Farwell v. Becker* (1889) 129 Ill. 261, 21 N. E. 792; *Selz v. Unna* (1867, U. S.) 6 Wall. 327; *Vandiver v. Pollack* (1895) 107 Ala. 547, 19 So. 180; *First Nat. Bank of Pawnee v. Avery Planter Co.* (1903) 69 Neb. 329, 95 N. W. 622; see *Acheson v. Miller* (1853) 2 Ohio St. 203; *contra: Wehle v. Haviland* (1872, N. Y. C. P.) 42 How. Prac. 399 (apparently on the theory that the command to the sheriff made the act of the creditors a "wilful" act).

[29] *Armstrong County v. Clarion County* (1870) 66 Pa. 218.

[30] ". . . that rule of *Merryweather v. Nixan* is applicable only where the person seeking contribution was guilty of an intentional wrong, or at least, where he must be presumed to have known that he was doing an illegal act." *Ankeny v. Moffett* (1887) 37 Minn. 109, 33 N. W. 320.

[31] *Nickerson v. Wheeler* (1875) 118 Mass. 295; *contra: Andrews v. Murray* (1861, N. Y.) 33 Barb. 354 (seemingly overlooking the fact that there is a difference between neglecting to file a report, and filing a false report). A somewhat similar case allowed contribution. *Smith v. Ayrault* (1888) 71 Mich. 475.

sole last chance it would seem that neither indemnity nor contribution should be allowed. There remain for consideration those cases where it is not proved that either the plaintiff or the defendant had the last chance. In such cases the plaintiff is guilty of contributory negligence, and therefore cannot recover against the defendant tort feasor for his own injuries. If we are to deny him also the right to contribution for the injury to the third party, it would seem that the real ground is in the same rule of contributory negligence,[32] and that the emaciated rule of *Merryweather v. Nixan* is again superfluous to the decisions. On the other hand if, as has been suggested by some, public policy recommends that contribution be—not denied—but allowed in such cases,[33] the retention of the old "no contribution" rule unnecessarily beclouds the real issue which is between the rule of contributory negligence and the public policy of an increasingly complex civilization.[34]

The "exceptions" to the original pronouncement are based upon well settled principles of law. The cases refusing indemnity or contribution in negligence cases are really supported by fundamental principles of the law of negligence. The "rule" of *Merryweather v. Nixan* not only is not a rule, but it is a totally inadequate and confusing description of the decisions professing to uphold it. The recurrent attacks of text-writers and periodical contributors has failed to argue it out of the law. If for no other reason than efficiency in preparing and deciding cases, it is believed that the "principle" in its present form should be read out of the law. By the weight of modern authority a joint tort feasor may have indemnity or contribution, as the circumstances may require, in all cases except (1) when his tort was "wilfully" committed, or, in cases of mutual negligence, (2) when he alone had the last chance to avoid, or (3) when it has not been proved that any one of the tort feasors had the last clear chance. There is good reason to hope that the courts will tend to allow contribution in the third group of cases.[35]

### JUDICIAL ENCROACHMENT ON STATUTES OF LIMITATION

A recent New York case, *Brush v. Lindsay* (2d Dept. 1924) 210 App. Div. 361, 206 N. Y. Supp. 304, has opened the field of conjecture

[32] See *City of Tacoma v. Bonnell* (1911) 65 Wash. 505, 118 Pac. 642; *Owensboro City Ry. v. Louisville St. L. Ry.* (1915, Ky.) 178 S. W. 1043; *Adams v. White Bus Line* (1921) 184 Calif. 710, 195 Pac. 389; cases cited *supra* notes 18, 19, 20.

[33] *Palmer v. Wick & Pultney-town S. S. Co., supra* note 16; *Ellis v. Chicago and N. W. Ry.* (1918) 167 Wis. 392, 167 N. W. 1048.

[34] Reath, *op. cit. supra* note 4, at p. 193; NOTES (1914) 1 VA. L. REV. 313. Missouri, by statute, permits contribution between negligent tort feasors in some cases. Mo. Rev. Sts. 1909, sec. 5431; *Eaton v. Miss. Valley Trust Co.* (1906) 123 Mo. App. 117, 100 S. W. 551. Unless refusal of contribution in such cases acts as a deterrent, which may be doubted, it is perhaps fair to allow contribution between negligent tort feasors as to injuries to third parties, while leaving them as they are as between themselves.

[35] *Supra* notes 29, 30, 31, 33, 34.

on an interesting problem which the court presented but declined to answer. The defendants, who were physicians, swore out alleged false affidavits indicating that the plaintiff was insane, and further stated that to serve notice on her would merely tend to aggravate her condition. In reliance on these statements the plaintiff was committed to an asylum without being extended an opportunity to have her mental condition examined in court. Ten years later a nurse in the hospital instituted *habeas corpus* proceedings and the plaintiff was released. In an action of false imprisonment the defendant set up as a bar the two-year statute of limitations.[1] The lower court dismissed the complaint, and the Appellate Division, in reversing, declared that since the false imprisonment was a continuing one, the right of action was not totally barred, but that the plaintiff could recover damages for the last two years. The court refused to venture an opinion as to whether the plaintiff could recover for the first eight years, intimating, however, that she could not. Assuming the action of false imprisonment to have been well brought,[2] the intimation is not without precedent among the older cases,[3] although there is no indication that they exerted any influence in this instance; and they seem to be generally disregarded in most modern decisions of a kindred nature.

Early in the history of England certain notable events[4] were designated, by reference to which actions not brought within a certain period were customarily barred, the object being to penalize negligent parties who had slept upon their rights and to quiet otherwise interminable litigation.[5] With the lapse of time, however, the points of reference

[1] N. Y. C. P. A. 1920, sec. 50.

[2] By the general rule when a valid judgment intervenes between the defendant's wrongful act and the actual imprisonment, the action must be framed in malicious prosecution rather than false imprisonment. *Lock v. Ashton* (1848) 12 Q. B. 871; *Ayers v. Russell* (1888, Sup. Ct. 3d Dept.) 50 Hun, 282, 3 N. Y. Supp. 338; *Gearity v. Strasbourger* (1909, 1st Dept.) 133 App. Div. 701, 118 N. Y. Supp. 257; Burdick, *Law of Torts* (3d ed. 1913) sec. 292; Salmond, *Law of Torts* (5th ed. 1920) 397; *contra: Hurlehy v. Martine* (1890, Sup. Ct. 3d Dept.) 56 Hun, 648, 10 N. Y. Supp. 92. The distinction has received added weight in a famous statement by Willes, J. in *Austin v. Dowling* (1870) L. R. 5 C. P. 534, 540. For a discussion of the essential elements of both causes see Cooley, *Elements of Torts* (1895) 50; Burdick, *op. cit.* sec. 293; Winfield, *Present Law of Abuse of Legal Procedure* (1921) 174.

[3] *Aldridge v. Duke* (1687, K. B.) 3 Mod. 111; see *Coventry v. Apsley* (1692, K. B.) 2 Salk. 420; *cf. Massey v. Johnson* (1810, K. B.) 12 East, 67; Lightwood, *Time Limit on Actions* (1909) 201 (although the cases cited there are not conclusive on the point).

[4] Such notable events as the beginning of the reign of Henry I, the return of John from Ireland, the journey of Henry III into Normandy, and the coronation of Richard I were used as points of reference in the limitation of actions. Banning, *Law of Limitation of Actions* (3d ed. 1906) 1; *cf.* Coke, *Littleton*, *114b.

[5] (1540) 32 Henry VIII, c. 2; see *Cholmondeley v. Clinton* (1820, Ch.) 2 Jac. & W. 1, 140; *Tolson v. Kaye* (1822, C. P.) 3 Bro. & B. 217, 223, 129 Eng. Rep. 1267, 1269; *Bell v. Morrison* (1828, U. S.) 1 Pet. 351, 360; *Lewis v. Marshall*

became more uncertain and the resulting confusion greater. Consequently there were passed the series of statutes beginning with that of (1540) 32 Henry VIII, c. 2,[6] "so that by one constant law certain limitations might serve both for the time present and for all time to come."[7] This statute, applying only to actions relating to real estate, was followed three-quarters of a century later by the famous statute of (1623) 21 James I, c. 16, which extended the bar to actions personal as well as real. This is the foundation of most modern American statutes of limitation.[8] In all of these enactments it was provided that certain disabilities would prevent the statute from running when the person to whom a right of action accrued was at the time within one of the groups thus expressed. These disabilities were usually infancy, coverture, *non compos mentis,* imprisonment and absence beyond the seas. They have been in general reproduced in modern statutes, with the main exception of imprisonment, expressly declared a disability in only about one-half of the states.[9]

Courts of equity, which had from the moment of their inception defended debtors harassed by claims grown stale through the laches of persons entitled to sue, were not slow to adopt by analogy the limitations imposed by the legislature on actions at law.[10] With their greater susceptibility to moral suasion, however, the chancellors did not consider themselves strictly bound by the statutes and so developed the doctrine of "concealed fraud"[11] in order to prevent the lapse of time from being interposed by one who had obtained his legal advantage[12] "unconscion-

(1831, U. S.) 5 Pet. 470, 477; 1 Wood, *Limitation of Actions* (4th ed. 1916) sec. 5. For a discussion of the history of the statutes of limitation see Buswell, *Limitations and Adverse Possession* (1889) sec. 9; Angell, *Limitation on Actions at Law* (5th ed. 1869) ch. 1 & 2; Brown, *Law of Limitation as to Real Property* (1869) sec. 1.

[6] The most famous of these were the one mentioned and (1623) 21 James I, c. 16, sec. 7; (1705) 4 Anne, c. 16; (1853) 16 & 17 Vict. c. 113, sec. 20; (1856) 19 & 20 Vict. c. 97.

[7] 1 Coke, *Institutes,* *95.

[8] Buswell, *op. cit. supra* note 5, sec. 11; 1 Wood, *op. cit. supra* note 5, sec. 2.

[9] The disabilities of imprisonment and absence beyond the seas contained in previous statutes were repealed by (1856) 19 & 20 Vict., c. 97, sec. 10. Where a statute does not expressly declare imprisonment a bar to its application, courts often refuse to so consider it. *Bledsoe v. Stokes* (1872, Tenn.) 1 Baxt. 312. For a general discussion of disabilities under modern statutes see 2 Wood, *op. cit. supra* note 5, ch. 22. The statutory disabilities in New York may be found in N. Y. C. P. A. 1920, sec. 60.

[10] Angell, *op. cit. supra* note 5, ch. 3. For a discussion of this equitable evolution, see *Deloraine v. Browne* (1792, Ch.) 3 Bro. C. C. 519, 523, note; *Bond v. Hopkins* (1802, Ch.) 1 Sch. & Lef. 414, 428.

[11] *Booth v. Earl of Warrington* (1714, H. L.) 2 Eng. Rep. 111; see *Deloraine v. Browne, loc. cit. supra* note 10; *cf. Bicknell v. Gough* (1747, Ch.) 3 Atk. 558; *Roche v. O'Brien* (1808, Ch.) 1 Ball & B. 330; Clerk & Lindsell, *Torts* (7th ed. 1921) 186; see also *supra* note 10.

[12] At law the mere fact of a plaintiff's inability to sue by reason of ignorance of his cause of action would not prevent the statute from running. *Imperial Gas*

ably." This doctrine received legislative recognition in the statute of (1833) 3 & 4 William IV, c. 27, sec. 26, in which it was applied to actions relating to land, and thenceforth, as might be expected, was subject to the most stringent application. One was required to bring his case clearly within the statutory provision to receive the benefit of its relief.[13] Such was the uniform tendency in the treatment of all these codified disabilities of equitable origin; and courts considered the statute as a panacea by which all difficulties might be resolved, declaring themselves unable to consider as exceptions situations not expressly mentioned by the legislature. This view has apparently been adopted by many of the courts of the United States.[14]

Despite this professed inability to go beyond the statutory exceptions to extend relief to disabled parties, numerous situations appear where the equitable influence has seemed to prevail in extending relief to claimants who would otherwise be barred.[15] These lend themselves to classification into what may be conveniently termed "factual inabilities" on the one hand and "legal disabilities" on the other, both applying to instances where one has been unable to bring his suit within the statutory period.

Under the group denominated "factual inabilities" may be classed the cases of "concealed fraud" alluded to above, where a cause of action undeniably exists, but where the party who would otherwise sue thereon is "factually" unable to do so by reason of his ignorance of its existence. In such cases the statute does not begin to run until the plaintiff has, or with the exercise of reasonable diligence, could have discovered the facts

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*Co. v. London Gas Co.* (1854, Exch.) 10 Exch. 39 (defendant, unknown to the plaintiff, bored into gas pipes and converted gas); Clerk & Lindsell, *loc. cit. supra* note 11.

[13] Where the rightful ownership of lands of a plaintiff's ancestor was concealed for a hundred years by mutilation of a marriage certificate forming the principal link in the chain of title, no recovery was granted. *Chetham v. Hoare* (1870) L. R. 9 Eq. 571, 577. So also where an action was brought seventy years after its accrual, the court refused relief. *Lawrance v. Norreys* (1890, H. L.) L. R. 15 A. C. 210. See also *Armstrong v. Milburn* (1885, Q. B.) 54 L. T. R. (N. S.) 247; *Concealed Fraud* (1880) 25 SOL. JOUR. 147, 148.

[14] *Kendall v. United States* (1878) 14 Ct. of Claims 374; *Powell v. Koehler* (1894) 52 Ohio St. 103, 39 N. E. 195; *cf. Makepeace v. Bronnenburg* (1896) 146 Ind. 243, 45 N. E. 336 (habitual drunkard not excepted); 2 Wood, *op. cit. supra* note 5, sec. 252; Buswell, *op. cit. supra* note 5, sec. 104. "It has never been determined that the impossibility of bringing a case to a successful issue, from causes of uncertain donation . . . . shall take such case out of the operation of the act of limitations unless the legislature shall so declare its will." Marshall, C. J. in *McIver v. Ragan* (1817, U. S.) 2 Wheat. 25, 30.

[15] The joinder of law and equity would seem to result in a more liberal view toward defenses formerly available only in suits of an equitable nature. and to countenance an application of the principles of "concealed fraud" in a class of cases in which it was formerly denied. See *Gibbs v. Guild* (1882) L. R. 9 Q. B. 59, 66; Salmond, *op. cit. supra* note 2, at pp. 160, 161 (especially in England). For a discussion as to its application in American courts in actions formerly legal, see (1895) 34 AM. L. REG. (N. S.) 469, 470.

constituting the cause of action.[16] Under this denomination also may fall the instances of duress,[17] undue influence,[18] and mistake.[19] Similarly in the case of malpractice by a physician, the "factual inability" of the patient has been held to delay the running of the statute until the termination of the confidential relation and a discovery of the negligence.[20] This constitutes a noticeable exception to the rule normally applied to negligently inflicted injuries.[21] A further inclusion within this group appears in the case of claims arising in favor of the estate of a decedent, where it has been held that the statute does not begin to run until the appointment of an administrator, as previously there was no one in existence capable of suing.[22] Several times have the courts been called upon to consider slavery with respect to the statute of limitations; and it seems to have been uniformly considered such a disability as would prevent the statute from running. The courts have, however, differed in their reasoning, some holding it imprisonment within the statutory meaning,[23] others considering it as an insuperable hindrance[24]

[16] *Supra* note 11. See also *Trevelyan v. Charter* (1835) 4 L. J. Ch. (N. S.) 209; 43 SOL. JOUR. (1899) 202, 203; (1895) 34 AM. L. REG. (N. S.) 464; Lightwood, *op. cit. supra* note 3, at p. 297. "When the defendant has not only elected to set up the statute, but has previously by deception or by any violation of duty toward the plaintiff, caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which equity will not allow him to hold." Stevenson, V. C., in *Clark v. Augustine* (1901) 62 N. J. Eq. 689, 694, 51 Atl. 68, 70.

[17] *Allen v. Leflore County* (1901) 78 Miss. 671, 29 So. 161; *Howard v. Carter* (1905) 71 Kan. 85, 80 Pac. 61 (statute does not begin to run until duress ceases).

[18] In the case of undue influence the statute has been held not to run during the exercise of such influence. *Oldham v. Oldham* (1859) 58 N. C. 89; *Aldrich v. Steen* (1904) 71 Neb. 33, 98 N. W. 445.

[19] In the case of mistake, as in those of fraud, duress and undue influence, the statute does not begin to run until the actual discovery of the mistake or the time when such discovery ought, with the exercise of reasonable diligence, to have been discovered. *Bacon v. Bacon* (1907) 150 Calif. 477, 89 Pac. 317; *Alexander v. Owen County* (1910) 136 Ky. 420, 124 S. W. 386; *Jackson-Walker C. & M. Co. v. Miller* (1913) 88 Kan. 763, 129 Pac. 1170.

[20] *Gillette v. Tucker* (1902) 67 Ohio St. 106, 65 N. E. 865; *cf. Neil v. Flynn Lumber Co.* (1916) 78 W. Va. 235, 88 S. E. 1090; see Drake, *Rule of Law and Legal Right* (1920) 19 MICH. L. REV. 365, 373.

[21] In such cases the statute ordinarily begins to run on the accrual of the right of action—the time when the injuries resulted from the negligent act. *Fadden v. Satterlee* (1890, C. C. S. D. Iowa) 43 Fed. 568; Burdick, *op. cit. supra* note 2, sec. 273.

[22] *Murray v. East India Co.* (1821, K. B.) 5 B. & Ald. 204; *Gunther v. Philadelphia & R. Ry.* (1924, C. C. A. 3d) 1 Fed. (2d) 85; Buswell, *op. cit. supra* note 5, secs. 369, 370; Clerk & Lindsell, *op. cit. supra* note 11, at p. 184; (1925) 34 YALE LAW JOURNAL, 450. Where a debtor disappeared after the accrual of a cause of action and there was no presumption of his death for five years thereafter, the statute was suspended during the interval until the appointment of an administrator. *Heckman v. Kassing* (1921) 76 Ind. App. 401, 132 N. E. 379.

[23] *Matilda v. Crenshaw* (1833, Tenn.) 4 Yerg. 299; *Price v. Slaughter* (1871) 1 Cinc. Super. Ct. 429.

[24] *Berry v. Berry's Admr.* (1894) 15 Ky. L. Rep. 865, 22 S. W. 654.

in the nature of a "factual inability," and still others recognizing the aspect of "legal disability" in view of the consistent refusal of courts to entertain slaves as suitors.[25]

Chief among the situations in the class of "legal disabilities" are those where the closure of courts by reason of war has precluded parties from an opportunity to litigate their claims. The common law of England recognized no such disability;[26] and its development presents an interesting example of the liberal view which courts have gradually evolved to grant relief where they believe it due.[27] Other cases have arisen in great variety where courts have considered themselves justified in refusing to permit the interposition of the statutory bar against a suitor who has been deprived of access to the courts by "paramount authority."[28] Insolvency presents more examples, as the statute has been held to apply neither against creditors of an insolvent during the pendency of bankruptcy proceedings,[29] nor against the creditor-cestuis of an insolvent whose assets are in the hands of express trustees.[30] A further application of this classification may well include the cases of successive disability, where the English courts have held that the statute does not begin to run until removal of the last impediment.[31]

The authorities thus cast doubt on the often repeated statement that "the courts are without authority to enlarge or change those [exceptions] specified, or establish others, though in particular cases the ends of

[25] See *Bland v. Dowling* (1837, Md.) 9 Gill. & J. 19, 27; *cf. Wood v. Ward* (1878, S. D. Ohio) Fed. Cas. nos. 17965, 17966.

[26] *Prideaux v. Webber* (1657, C. P.) 1 Levinz, 31 (statute held to run against a cause of action for false imprisonment even while courts were closed by the usurpation of rebels); *cf. Hall v. Wyborn* (1690, K. B.) 2 Salk. 420.

[27] Originally the statute was tolled only when the lines of war so intervened between the parties as to make one an alien anemy. *Hanger v. Abbott* (1867, U. S.) 6 Wall. 532; *Brown v. Hiatts* (1872, U. S.) 15 Wall. 177. Later, however, the statute was held not to run whenever the courts were closed by reason of war, regardless of the status of the parties. For an interesting discussion of this development see Gregory, *Effect of War on the Operation of Statutes of Limitation* (1915) 28 HARV. L. REV. 673. For other cases on this point see *Braun v. Sauerwein* (1869, U. S.) 10 Wall. 218, 222; *U. S. v. Wiley* (1870, U. S.) 11 Wall. 508, 513; *Wirtele v. Grand Lodge A. O. U. W.* (1923, Neb.) 196 N. W. 510.

[28] Thus the statute was held not to run during the period when claims affecting public lands were under advisement in the United States land office, which had sole jurisdiction over such matters. *St. Paul M. & M. Ry. v. Olson* (1902) 87 Minn. 117, 91 N. W. 294. Similarly where the charter of a town was repealed by the state and the statutory period had elapsed before re-incorporation under a new name, claims of bondholders of the original town were held not barred. *Broadfoot v. Fayetteville* (1899) 124 N. C. 478, 32 S. E. 84. And since a foreign ambassador is immune from civil responsibility during the period of his embassy, the statute does not begin to run until the cessation of that status. *Munsurus Bey v. Gadban* [1894, C. A.] 2 Q. B. 352.

[29] *Munns v. Burn* (1887) L. R. 35 Ch. Div. 266; Darby & Bosanquet, *Statutes of Limitation* (2d ed. 1899) 51; 2 Wood, *op. cit. supra* note 5, sec. 253, g.

[30] *Insolvent Estate of Conrad Leiman* (1869) 32 Md. 225, 243.

[31] Darby & Bosanquet, *op. cit. supra* note 29, at p. 61. It appears that in America a contrary view prevails. Angell, *op. cit. supra* note 5, at p. 479.

justice would seem to be subserved if it were done."[32] There plainly exists in the minds of many tribunals a distinct aversion to supporting the statutory bar when the party against whom its protection is sought has been unable to prevent its perfection. The same attitude is well exemplified in the evasion by the courts of the strict application of the doctrine of prescription. The historical basis of acquisition of rights by prescription lay in the presumption of a lost grant, presumed from the apparent acquiescence of the servient owner in permitting the continuance of the burden upon his land. But without his ability ("factual" or "legal") to terminate the wrongful user, the presumptive acquiescence failed, and no prescriptive right could in general be acquired.[33] The same sympathy for a party unable to prevent the running of the statutory period against his claim may have actuated the court in *Brush v. Lindsay* to declare that since the imprisonment was a continuing one,[34] recovery might be had for the the last two years.[35] But even if we grant that the imprisonment was a continuing one, the

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[32] See *Powell v. Koehler, op. cit. supra* note 14, at p. 119, 39 N. E. at p. 196.

[33] *Chasemore v. Richards* (1859) 7 H. L. 349 (no prescriptive right can be obtained to underground percolating waters); *Webb v. Bird* (1863) 13 C. B. (N. S.) 841; Carson, *Prescription and Custom* (1907) 11. ". . . but I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power." Fry, J. in *Dalton v. Angus* (1881, H. L.) L. R. 6 A. C. 740, 774. Despite the general applicability of this view, the easement of "ancient lights" in England forms a noticeable exception. Gale, *Easements* (9th ed. 1916) Ch. 2. The recognition of such easements when in fact the servient owner was incapable of preventing their perfection probably was actuated by a desire to maintain as much light and air in crowded districts as possible during the European plagues. In America, with no such problem to be met, the courts have strictly applied the rules of prescription, and have generally repudiated the doctrine of "ancient lights." The leading case on the American view is *Parker v. Foote* (1838, N. Y. Sup. Ct.) 19 Wend. 309. For a discussion of the doctrine of "ancient lights" in England and America see Washburn, *Easements & Servitudes* (4th ed. 1885) ch. 4, sec. 6.

[34] A number of authorities have adopted the view that a false imprisonment constitutes a "continuing trespass." *Huggins v. Toler* (1866, Ky.) 1 Bush, 192; *Shugart v. Cruise* (1919, C. C. A. 4th) 260 Fed. 36; see *Ruffner v. Williams* (1869) 3 W. Va. 243, 245; *cf. Leland v. Marsh* (1820) 16 Mass. 389, 391; Clerk & Lindsell, *op. cit. supra* note 11, at p. 183; Darby & Bosanquet, *op. cit. supra* note 29, at p. 45. This rule appears to be sanctioned by several old English cases. *Hardy v. Ryle* (1829, K. B.) 9 B. & C. 603, 608; *cf. Bailey v. Warden* (1815, K. B.) 4 M. & S. 400; see also *supra* note 3. It is to be observed, however, that where the theory was applied in those cases it was to grant an entire right of action which would otherwise have been barred. It is submitted that the doctrine, if to be applied at all, should be limited to the situations of its origin—actions concerning land. See *Darley Main Colliery Co. v. Mitchell* (1886, H. L.) L. R. 11 A. C. 127, 144; *Kansas Pacific Ry. v. Mihlman* (1876) 17 Kan. 224, 230 *et seq.*; (1924) 33 YALE LAW JOURNAL, 557.

[35] At p. 367, 206 N. Y. Supp. at p. 309.

plaintiff was so manifestly deprived of her ability to resort to the courts during that period (whether such be a "factual inability" or a "legal disability" growing out of the court's refusal to entertain a claim for damages until vacation of the original commitment order), that the case would seem to present a perfect plea for the judicial interference which has been extended in cases no more "unconscionable." The adoption of such a view will result in extending the plaintiff a recovery for the whole ten years rather than for the last two only. But it seems that the court could have granted relief for the entire period of imprisonment without adopting the fictional theory of a continuing trespass.[36] The commitment of the plaintiff at the defendant's instance may be regarded as the sole cause of action.[37] The subsequent continuance of this detention is therefore viewed as merely an aggravated consequence of the wrongful act, having its effect on the measure of damages[38] only and giving rise to no new rights of action each day it continued. The statute should begin to run against this entire cause of action only on removal of the disability.[39]

It seems that the court was unduly cautious in its intimation that the plaintiff could recover for only the last two years. A declaration that the plaintiff could recover for the entire period of imprisonment would have found support in precedent.[40]

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[36] As a normal rule of torts a right of action accrues on the occurrence of an act unlawful in itself. *Raynor v. Mintzer* (1887) 72 Calif. 585, 18 Pac. 82; see *Kansas Pacific Ry. v. Mihlman, loc. cit. supra* note 34; Burdick, *op. cit. supra* note 5, sec. 273. And the statute starts to run on the accrual of the right of action. This is aptly illustrated by the case of seduction, where the right of action arises immediately on the unlawful act, and subsequent consequences are considered only as affecting the measure of damages. *Dunlap v. Linton* (1891) 144 Pa. 335, 22 Atl. 819; *cf. Rockwell v. Day* (1918) 101 Wash. 580, 172 Pac. 754.

[37] "Cause of action" is used throughout this discussion to denote the operative facts which give rise to the plaintiff's "right of action"—a distinction stressed by several pleading authorities. Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817.

[38] In the absence of malice in false imprisonment damages are granted for the injuries actually sustained as a result of the acts on which the right of action rests. 1 & 2 Sedgwick, *Damages* (8th ed. 1891) sec. 352, 372, 461; 3 Sutherland, *Damages* (2d ed. 1893) sec. 1257; see *Voltz v. Blackman* (1876) 64 N. Y. 440, 444; Salmond, *op. cit. supra* note 2, sec. 35. For a general discussion of damages in false imprisonment, see 1 Joyce, *Damages* (1903) ch. 19.

[39] A number of cases have considered the right of action complete on the release of the imprisoned party, the statute beginning to run at that time. *Dusenbury v. Keiley* (1880, N. Y. C. P.) 8 Daly, 537, aff'd. (1881) 85 N. Y. 383; *Hackler v. Miller* (1907) 79 Neb. 206, 112 N. W. 303; *Alexander v. Thompson* (1912, C. C. A. 6th) 195 Fed. 31; *Lane v. Ball* (1917) 83 Or. 404, 160 Pac. 144. It is significant, however, that in none of these cases was the imprisonment continued so long as to raise the problem of the instant case.

[40] "The law of no free country can tolerate a condition of things under which a person innocent of crime and threatening no injury to himself or others can be restrained of his liberty and no person be responsible for the injury he suffers." Cooley, J. in *Van Deusen v. Newcomer* (1879) 40 Mich. 90, 134.